IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA:

Cr.A.No.392 of 2000

Date of Decision : 29th October, 2007.

State of H.P. …Appellant.

Versus:

Balbir Singh …Respondent.

Coram:

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] Yes.

For the appellant: Mr.Ashok Chaudhary, Addl. Advocate General.

For the Respondent. Mr. Ajay Sharma, Advocate.

Sanjay Karol, J (Oral).

The matter is heard again.

The present appeal arises out of judgment dated 17th February, 2000 passed by Additional Sessions Judge-II, Kangra at Dharamshala, in Criminal Appeal No. 7-N/X/97, titled as Balbir Singh vs. State of H.P., acquitting the accused of the charged offence under Sections 279 and 304-A I.P.C while reversing the judgment of conviction passed by Judicial Magistrate Ist Class, Nurpur, Distt. Kangra, in Cri. Case No.99-1/91,89-2/92.

The respondent/accused Balbir Singh was charged and held guilty for commission of offence under Sections 279 and 304-A, IPC and was directed to undergo sentence of rigorous imprisonment

[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

for six months and also pay a fine of Rs.1,000/- by Judicial Magistrate Ist Class, Nurpur. The said judgment was assailed by him by way of an appeal and in terms of the impugned judgment the conviction was set aside and the accused was acquitted of the charged offence. The said decision is subject matter of present appeal.

As per the case of the prosecution, a complaint was lodged with Police Station-Nurpur that on 7.4.1989 the complainant-Lal Singh his wife Smt. Savitri Devi and his son Shamsher Singh, aged 9 years, were standing in the rain shelter at Dhaki, Nurpur, H.P and waiting for the bus to arrive. Their son, Shamsher Singh, who was having an orange had just stepped out of the rain shelter when the accused who was driving vehicle No. HPK-8369 came at high speed on the extreme left side of the road and hit their son resulting into his instant death. The accident occurred as the vehicle was being driven by the accused rashly and negligently.

On the basis of the complaint and statement under Section 154 Cr.P.C., F.I.R. (Ext.PW-3/A) bearing No.69 of 1989 was registered with the Police Station-Nurpur, under Sections 279 and 304-A I.P.C. The investigation was started by the police and after visiting the spot the truck was impounded vide seizure memo (Ext.PW-8/A) and the "Chappal" (slippers) of the deceased was also taken into possession vide Ext.PW-6/A. The body was sent for post mortem vide application (Ext.PW-2/A) and post mortem report (Ext.PW-2/B) was obtained by the police. The vehicle was also got mechanically examined as per report Ext.PW-5/A. After completion of the investigation, the challan was presented in the Court for trial.

Notice of accusation for the offence under Sections 279 and 304-A IPC was put to the accused to which he did not plead guilty and claimed trial. In order to prove its case the prosecution examined

9 witnesses and the statement of the accused under Section 313 of Cr.P.C. was also recorded.

Based on the material on record, the trial Court vide its judgment dated 23.4.1997 convicted the accused of the charged offence and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs.1,000/- and in default thereof to further undergo simple imprisonment of one month.

In an appeal carried by the accused, the first appellate Court, however, reversed the judgment and acquitted the accused on the ground that no independent witness was examined by the prosecution and the testimony of the parents of the deceased, father Lal Singh (PW-3) and mother Savitri Devi (PW-7) was disbelieved only on the ground that they were partisan and interested witnesses and their version was not corroborated by any independent witness.

In ***Rathnashalvan*** *vs.* ***State of Karnataka***, (2007) 3 Supreme Court Cases 474 and **Prabhakaran** v. **State of Kerala,** AIR 2007 Supreme Court 2376, the apex Court has considered what rashness and negligence would mean in the context of criminal culpability:-

> "5. Section 304 A speaks of causing death by negligence. This section applies to rash and negligent acts and does not apply to cases where death has been voluntarily caused. This section obviously does not apply to cases where there is an intention to cause death or knowledge that the act will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a rash and negligent act. A negligent act is an act done without doing something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genes, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately that the mischievous or illegal consequences may fall, but with a hope that they will not…"

"6. Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.

7. As noted above, "Rashness" consists in hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted."

(Emphasis supplied)

Constable Lachhman Singh (PW-1) got the post mortem carried out and obtained the post mortem report. Rajinder Singh (PW-2) is the photographer who took the photographs at site and exhibited the same alongwith negatives (Ext.PW-2/A to Ext.PW-2/H). Yash Pal Shogha (PW-4) is a witness to the recovery of the documents of the vehicle in question vide memo (Ext.PW-4/A). Mohinder Singh (PW-5) is the witness who has carried out the mechanical examination

of the vehicle and has exhibited his report Ext.PW-5/A. Mangat Ram (PW-6) is the witness to the recovery of the Chappal of the deceased vide memo i.e. Ext.PW-6/A. Raghubir Singh (PW-8) is the witness of the recovery of the vehicle vide seizure memo (Ext.PW-8/A). S.I. Sanjhi Ram (PW-9) has received the Rukka (Ext.PW-9/A) containing the statement under Section 154 Cr.P.C. and registered the FIR (Ext.PW-3/A).

All the aforesaid witnesses have proved the recording of the F.I.R; death of Shamsher Singh, aged 9 years, as a result of the accident; the seizure of the vehicle in question alongwith its documents; the recovery of the Chappal of the deceased; the mechanically examination of the vehicle. Photographs were also obtained by the police during the investigation of the case.

Question, therefore, which needs to be considered is to whether, it was the accused who was driving the vehicle at the relevant time and whether the vehicle was being driven by him in rash and negligent manner so as to endanger human life.

For determining the same, statements of the remaining two witnesses i.e. parents of the deceased, namely, Lal Singh (PW-3) and mother Savitri Devi (PW-7) needs to be examined. PW-3 has deposed that he alongwith his wife and son were waiting for the bus at rain shelter Dhaki. Their son who was eating an orange had just stepped out of the rain shelter when a vehicle, driven by the accused came in a rash and negligent manner and hit his son who was dragged for quite a distance and as a result of the accident he died on the spot. The accused-driver ran away from the spot. He lodged a complaint and got FIR (Ext.PW-3/A) registered with the Police Station. The police came at the spot and carried out the investigation. He has testified the preparation of the post mortem report. This witness has

been cross examined at length. In cross examination he has admitted that at the time and spot of the accident number of persons were present. He has admitted that he had not stated the speed of the vehicle to the police while getting his statement (Ext.PW-3/A) recorded, but clarified that the speed of the vehicle was approximately 70 to 80 Kms. per hour. In cross-examination he has clarified that the vehicle was being driven on the extreme left side of the road, just adjacent to the rain shelter and from the place of accident the vehicle stopped after 7 to 8 mts. He has denied the suggestion that the shirt of the child had got entangled with the vehicle. He has denied the suggestion that the accident occurred due to the reason that the deceased got frightened of the sound of the vehicle and had fallen due to his own fault. He has further denied the suggestion that the driver was driving the vehicle at normal speed and that the accident occurred spontaneously.

PW-7 mother of the deceased has corroborated the version of PW-3. She has stated that the vehicle was being driven at great speed. In the Court she identified the accused, having driven the vehicle, at great speed, with which her child was hit and dragged for some distance resulting into his death. In cross-examination she has admitted that there were other persons present at the spot. She has deposed that the truck was being driven on the left side and the child was also on the left side of the road. She could not state as to whether the child had been dragged for the reason that he had got entangled with the vehicle. She has also denied the suggestion that child got scared of the sound of the vehicle and fell out of the rain shelter. She has denied the suggestion that vehicle was being driven at a normal speed.

From the line of cross-examination what emerges is that the accused was driving the vehicle with which the boy was hit resulting into his death. The presence of the accused at the place and time of occurrence is not disputed which even otherwise stands proved through the version of the aforesaid witnesses. The accused has not raised any defence of the mechanical failure of the vehicle in question. The defence taken is that at the relevant time the vehicle was being driven at the normal speed and the deceased had contributed to the occurrence of the accident. Through the statements of PW-3 and PW-7 it is proved that vehicle was being driven by the accused at great speed on the extreme left side of the road just adjacent to the rain shelter from where the deceased had just stepped out.

It has come on record that the spot where the accident occurred is on the national highway and from of the photographs (Ext.PW-2/A to PW-2/D) it is clear that the road is quite wide and the vehicle was being driven on the extreme left side of the road. That the vehicle was being driven at high speed is evident from the skid marks on the road which is quite visible from the photographs. Thus the version of PW-3 and PW-7 stands corroborated by the other contemporaneous documents on record. They have unanimously deposed that the accused was driving the vehicle on the extreme left side of the road and at high speed resulting into the accident. There is nothing in their cross examination which would impeach the credibility of these witnesses.

The accused has been identified by them. It has come on record that the accused ran away from the spot. The witnesses have not been cross-examined on this point. This also shows the guilt of the accused in the commission of the crime.

An attempt has been made to show that no independent witness has been associated during the stage of investigation or examined in the Court in spite of the fact that it has come on record through the version of PW-3 and PW-7 that there were other persons present at the time of the occurrence of the accident. PW-6 and PW-8 have been involved during the stage of investigation and are independent witnesses to the recovery of Chappal, seizure of vehicle and its documents. The parents have no reason to testify against the accused. Version of PW-3 and PW-7 alone is sufficient enough to convict the accused of the charged offences and to prove the culpability of the accused in the commission of the charged offence.

Submissions has been made by the learned counsel for the respondent that Investigating Officer has not been examined and the spot map has not been proved, which is fatal to the case of the prosecution.

In the present case the Investigating Officer was not the eye witness, the body was recovered and the post mortem report was got carried out and duly proved on record. Photographs and their negatives (Ext.PW-2/A to Ext.PW-2/D) have been proved. The Investigating Officer, in my view, could not have given any evidence as to the actual occurrence of the accident. Through the photographs the width of the road can be seen. The road is wide enough and 3 vehicles can easily cross each other. In any event no prejudice has been caused to the accused. The testimony of PW-3 and PW-7 is credible and the proved evidence with regard to the occurrence of the accident cannot be discarded or disbelieved for the simple reason that the I.O. has not been examined. Non examination of I.O. is not fatal to the case of the prosecution as has been held by the apex Court in **Ram Gulam Chaudhary and others** *vs.* **State of Bihar** (2001) 8

Supreme Court Cases 311, and ***Bahadur Naik*** *vs.* ***State of Bihar*** (2000) 9 Supreme Court Cases 153.

Further, it has not come on record that the child was negligent in crossing the road. The accident took place at a bus stop out side the rain shelter. Passengers and passers-by are bound to be there. The rain shelter, as is evident from the photographs, is visible from quite a distance as the road is straight. The accused was duty bound to exercise all due care and caution and be vigilant and careful while driving the vehicle particularly in front of the rain shelter where passengers were waiting for the buses. In cross-examination spot witnesses have been cross-examined by the accused to prove that there were 20-25 persons on the spot at the time of occurrence. The accident took place in broad day light at about 1.00 P.M. The site was visible, the weather was clear, therefore, it was expected of the driver not to drive the vehicle in a rash and negligent manner so as to endanger human life. The recklessness and indifference as to the consequences are writ large in the present case, which would only show the gross culpable neglect and failure to exercise reasonable and proper care and precaution to guard the passengers against an injury.

The accused was enjoined with the duty to have driven the vehicle in normal speed, exercising due care and caution, more particularly, at the spot where the accident occurred.

In my view, the trial Court, based on the evidence on record and on careful appreciation of evidence had rightfully come to the conclusion that the case against the accused stood proved beyond reasonable doubt. In this view of the matter, the present appeal is accepted. The view taken by the first appellate Court that the statements of PW-3 and PW-7 were not corroborated by independent

witness is unacceptable. Their testimony is unimpeachable, unshaken, truthful, trustworthy and needs to be accepted.

For the aforesaid reasons, the present appeal is accepted and the impugned judgment dated 17.2.2000 is reversed and that of the trial Court dated 23.4.1997 passed in Cri.Case No. 99-1/91, 89-2/92 is restored. The bail bonds are cancelled. The accused is directed to surrender within four weeks.

October 29, 2007 **(Sanjay Karol)**

(TM)